06-1760(L)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

On Petition for Review from the Federal Communications Commission

On Remand from the Supreme Court of the United States

FOX TELEVISION STATIONS, INC., et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

NBC UNIVERSAL, INC., et al.,

Intervenors.

BRIEF OF *AMICI CURIAE* FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Family Research Council is a non-profit corporation. Family Research Council does not have a parent corporation and is not publicly held.

Focus on the Family is a non-profit corporation. Focus on the Family does not have a parent corporation and is not publicly held.

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STATEMENT OF *AMICI*

FOCUS ON THE FAMILY is a non-profit religious corporation, headquartered in Colorado, committed to strengthening the family in the United States and abroad. The founder of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations. Dr. Dobson hosts, and Focus on the Family distributes, a daily radio broadcast about family issues heard on more than 1,000 radio stations in the United States, reaching millions of listeners weekly. Focus on the Family also publishes and distributes *Focus on the Family* magazine and other literature. Focus on the Family is concerned about the widespread distribution of illegal pornography and its profound negative effects on American society.

FAMILY RESEARCH COUNSEL ("FRC") is a non-profit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal.

Pursuant to Circuit Rule 29 (b) (2), this amicus brief is desirable to present the perspectives of two leading national organizations concerned about the state of the family in America and the negative effects of

indecency on families. The matters asserted in this brief, addressing the effects of indecency on families and the constitutionality of federal law and regulations protecting families from indecency, are relevant to the disposition of this case.

All parties to this action have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

"[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Roth v. United States*, 354 U.S. 476, 483 (1957). *Amici* contend that society has a strong and abiding interest, firmly grounded in the First Amendment, in maintaining standards of decency. This interest extends especially to the preservation of standards of decency with respect to the materials broadcast into the sanctuary of our homes. This Honorable Court should not assume that the public clamors for more indecency, as the Petitioners and its supporters do. There is no evidence whatsoever that the Federal Communications Commission has been inundated with complaints of the lack of indecent programs on broadcast TV or radio. Rock singer Bono has no more right to shout, "f***ing brilliant" in the homes of unsuspecting American families than we would have in his. He made himself an uninvited guest of those families that believed honorees at the Grammys would respect the norms of civilized discourse on broadcast television. Similarly, the indecent comments of singer/actress Cher and actress Nicole Richie are out of place in the homes of those families who thought that network television represented a safe haven for family viewing. Neither these personalities nor their network sponsors have rights under the U.S.

Constitution greater than the rights of the homeowners they invaded over the public airwaves.

Over the past fifty years, some courts, in the name of expanding free speech rights, have ignored the societal interest in decency, the government's interest in the protection of children from indecent content, and the right to be left alone, free from the constant barrage of indecent communications. This, coupled with lax enforcement by the Federal Communications Commission of indecency law until earlier this decade, has enabled the purveyors of indecency to overrun the rights of decent Americans, who are now bombarded by degrading, indecent, coarse, and sexually charged content on an almost round-the-clock basis.

Emboldened by the success of their counterparts in other forms of media, broadcasters have been pushing the envelope by gradually inserting more and more indecent content on an unsuspecting public. Like the frog in the kettle, society is being coarsened while broadcasters have, in the words of the late Senator, Daniel Patrick Moynihan, "defined deviancy down." DANIEL PATRICK MOYNIHAN, *Defining Deviancy Down*, THE AMERICAN SCHOLAR 17 (Winter 1993), cited in ROBERT BORK, SLOUCHING TOWARD GOMORRAH 3 (New York: Regan Books 1997). The communications of broadcasters over the public airwaves have often radically diverged from the

interests of the public itself that broadcasters are required to serve. Broadcasters now seek to invalidate all regulation of indecency on the public airwaves, leaving no safe haven whatsoever to the majority of Americans who desire decent programming.

Amici contend that it is critical to recognize the very real and vital societal interests in maintaining standards of decency, in conjunction with individual free speech rights. The FCC's revised guidance with respect to what constitutes indecency does exactly this and it does so well within the confines of the First Amendment. Further, it logically follows the very type of context-based analysis endorsed by the United States Supreme Court in *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978).

The unproven claims of broadcast media that the FCC's action is uneven, arbitrary and capricious, do not provide sufficient reason to cavalierly toss aside the protection given to decent individuals under United States Constitution and to ignore valid precedent. *Amici* urge this Court to follow that precedent and find that the FCC's action is a constitutionally permitted application of 18 U.S.C. § 1464.

American broadcast TV and radio are meant to be available to all. If the court opens the floodgates to so-called "adult material" at all hours on broadcast TV and radio in the name of the First Amendment, then TV and

radio will be open only to adults, not children, and, at that, only to adults who desire more indecent material. Television viewers will be forced to listen to indecent language. Profanity and sex will dominate daytime radio. Nothing in the First Amendment requires this result.

ARGUMENT

I. THE FCC'S ACTION RECOGNIZED THE STRONG HISTORICALLY-PROTECTED INTEREST IN PROMOTING PUBLIC DECENCY.

A. Historically, Public Decency Was Recognized and Protected as an Important Social Value That Was Compatible With Free Speech Rights Under the First Amendment.

The Founders of our nation considered the protection and advancement of morality to be a fundamental justification for protecting the freedoms of speech and press, and American courts balanced individual speech rights against society's interest in moral order. In an "Appeal to the Inhabitants of Quebec," the First Continental Congress explained:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of governments, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are ashamed and intimidated, into more honorable and just modes of conducting affairs.

1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774), available at http://memory.loc.gov/ll/lljc/001/0100/01210108.gif.

In the earliest days of our Republic, the First Amendment's free speech clause did not protect the right to engage in indecent or profane speech,[1] and indecent speech was freely regulated and punished, even when it was used in a political context. The *Manual of Parliamentary Practice*, drafted by Thomas Jefferson, and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of "impertinent" speech during debate and likewise provides that "[n]o person is to use indecent language against the proceedings of the house." THOMAS JEFFERSON, *Jefferson's Manual of Parliamentary Practice* §§ 359, 360, reprinted in MANUAL AND RULES OF HOUSE OF REPRESENTATIVES, H.R.Doc. No. 97-271, pp. 158-159 (1982), and cited by the United States Supreme Court in *Bethel School District v. Fraser*, 478 U.S. 675, 681-682 (1986).

Also, in our nation's early history, courts consistently recognized the importance of protecting the virtue of society in general and the young in particular:

> Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful . . . and shall we

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[1] *Roth* observed, citing dozens of historical sources, "The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes." *Roth*, at 482 (footnotes omitted).

> form an exception in these particulars to the rest of the civilized world?

People v. Ruggles, 8 Johns. 290 (N.Y.Sup. 1811).

In a similar vein, the Pennsylvania Supreme Court wrote:

> The destruction of morality renders the power of the government invalid. . . . The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences. . . . No man is permitted to corrupt the morals of the people...

Commonwealth v. Sharpless, 1815 WL 1297, 8-9 (Pa. 1815) (emphasis added).

The view of the Founders prevailed until the middle part of the twentieth century, as evidenced by the statement of Harvard Professor Zechariah Chafee, Jr., in his 1941 treatise, *Free Speech in the United States*:

> But the law punishes a few classes of words like obscenity, profanity...because the very utterance of such words is considered to inflict a present injury on listeners...This is a very different matter from punishing words because they express ideas thought to cause future danger to the state...[P]roperly limited they fall outside the protection of the free speech clauses...[P]rofanity, indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step towards truth, which is clearly outweighed by the social interest in order, morality, the training of the young and the peace of mind of those who hear and see...The man who swears in a street car is as much of a nuisance as the man who smokes there.

ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 149-150 (Cambridge, Mass.: Harvard University Press 1941).

The Supreme Court agreed, when in the following year it pronounced, in part paraphrasing Professor Chafee:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene.... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of *such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (citations omitted; emphasis added).

While it is true that *Roth* was decided in the context of an obscenity charge, the underlying concepts pertaining to the protection of public decency as a viable governmental interest apply equally to the use of all language, whether categorized as obscene, indecent, or profane. Justice Harlan, concurring in part in *Roth,* emphasized the right of a state legislature to protect public morality:

> It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the *moral fabric* of society. . . . The State can reasonably draw the inference that over a long period of time, the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on *moral standards.* And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.

Roth at 501-502 (Harlan, J., concurring in part and dissenting in part; emphasis added). Have we not seen evidence of Justice Harlan's prognostication in today's society where the bombardment of sexual images have led even to children producing and distributing child pornography in a new trend called "sexting" in which (primarily) children photograph themselves and their friends naked and distribute the resulting photos to each other via cell phones? While there is no direct evidence that broadcast indecency has contributed to the devastating trend, a reasonable person could conclude that it has. *See also* Section II B of this brief.

B. In Some Types of Communications, the Individual Interest in Free Expression Has Been Elevated Above the Societal Interest in Public Decency, Leading to a Coarsening of Society.

Despite Justice Harlan's wise warning, the Supreme Court soon thereafter retreated for a time from well grounded constitutional principals regarding the reach of the First Amendment. In *Jacobellis v. Ohio,* 378 U.S. 184 (1964), the States' power to set and preserve moral standards began to diminish. *Jacobellis* turned the focus of obscenity determinations away from what was perceived to be good for the social moral order as a whole and toward only a perceived harm to children. *Id.* at 195. *Jacobellis* tended to reduce the protection of public decency by removing local control and focusing on the effect of pornography upon recipients (such as children) as

opposed to the effect on public decency in general. In his dissent, Chief Justice Warren indicated that he viewed it as the Court's task "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely. . . ." *Id.* at 199. The Chief Justice acknowledged "society's right to maintain its moral fiber." *Id.* at 202. He believed the reconciliation of interests would best be served by the application of local community standards rather than the national standard recognized by the majority. *Id.* at 202-03.

The moral conscience of the community, formerly critical to the Court's construction of the First Amendment, continued to fade from prominence. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"("Memoirs") v. Massachusetts,* 383 U.S. 413 (1966), the Court reversed field on the importance of social value in the definition of obscenity. Previously, lewd and obscene materials were not considered to be within the First Amendment's protection precisely because they were "of such slight social value as a step to truth...." *Roth,* 354 U.S. at 485. But in *Memoirs,* the Court adopted the converse proposition, to wit, that if an otherwise obscene communication contained any material of redeeming social value, then it could not be banned without violating the First Amendment. *Memoirs,* 383 U.S. at 419 (plurality opinion). After *Memoirs,*

pornographers immunized their movies and books against obscenity convictions by injecting small amounts of material that might be deemed to have "redeeming social value." Through this contrivance, publishers of indecent material artificially cloaked themselves with First Amendment protection.

In the late 1960's, the Court handed down dozens of decisions, many of them *per curiam*, that "elevated pornography and other assaults on decency to the level of a First Amendment right." PHYLLIS SCHLAFLY, *The Morality of First Amendment Jurisprudence,* 31 HARV. J.L. & PUB. POL'Y 95, 97 (2008). In these decisions, "[t]he Supreme Court reversed dozens of judges, juries, and appellate courts in sixteen states, made laws against obscenity unenforceable, and lowered drastically the standards of decency in communities throughout America." *Id.*

This trend was reversed, however, in a series of cases leading up to the high Court's decision in *Pacifica*, most notably in *Miller v. California* 413 U.S. 15 (1973) and in *Ginsberg v. State of N. Y.*, 390 U.S. 629 (1968), in which the Court determined that a state could ban the sale of indecent but non-obscene printed material to minors.

II. THE *PACIFICA* COURT FOUND TWO SIGNIFICANT REASONS TO UPHOLD A BAN ON BROADCAST INDECENCY

A. The Right of Non-Consenting Adults to be Left in Peace in Their Homes.

In justifying its holding in *Pacifica*, the Court cited two primary reasons. The first of these reasons was a recognition of the rights of all Americans who did not want to be bombarded with indecent speech while listening to the radio or watching television, and that the individual's "right to be left alone" in the privacy of his or her home outweighed the rights of an intruding broadcaster to disseminate indecent communications. It stated:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.

Pacifica, 438 U.S. at 748, citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970).

This "right to be left alone" had previously been described by Justice Brandeis in his revered dissent in *Olmstead v. United States* as "the most comprehensive of rights and the right most valued by civilized men." 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Both the language and sentiment of Justice Brandeis' statement have continued to be a part of our jurisprudence to this day.

In *Rowan*, a case addressing the right of homeowners to opt out of unwanted advertisements sent through the mail, the Supreme Court held that

"the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan*, 397 U.S. at 736.[2] Balancing the competing rights in that case, the Court acknowledged "we are inescapably captive audiences for many purposes," but that "a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail," and that the householder should be "the exclusive and final judge of what will cross his threshold" even if this has the effect of "impeding the flow of ideas." *Id.* at 736-737.

The Court continued: "[w]eighing the highly important right to communicate ... against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-737. The Court concluded:

> We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one

[2] The Court has since opined that the common law "right to be left alone" is sometimes more accurately characterized as an "interest" that the States can choose to protect in certain situations. See *Hill v. Colorado*, 530 U.S. 703, 717, n.24 (2000), referencing *Katz v. United States*, 389 U.S. 347, 350-351 (1967). Whether the "right to be left alone" is defined as a "right" or an "interest" makes little difference in the argument as to whether it should be protected by the FCC in the circumstances of indecency flowing into one's own home. Whatever semantics are used, it has been consistently protected by our jurisprudence.

> has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.
>
> *Id.* at 738 (citation omitted).

There are certainly differences between *Rowan* and *Pacifica*. The former dealt with printed material sent through the mail, whereas the latter dealt with broadcast media. The statute discussed in *Rowan*, admittedly, merely allowed individual homeowners to affirmatively "opt out" of receiving certain mailings, whereas the *Pacifica* case allowed the FCC to regulate all broadcasts during certain times of day, whether or not the recipients of these broadcasts would have been subjectively offended by the content. Nonetheless, because of the unique characteristics of broadcast media the Supreme Court relied on the principles enunciated in *Rowan* to uphold the constitutionality of FCC regulation of indecency:

> [T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent

> language is like saying that the remedy for an assault is to run away after the first blow.

Pacifica, 438 U.S. at 748-749 (internal citations omitted).

Since *Pacifica*, the Court has continued to uphold the "right to be left alone" in one's own home articulated by Justice Brandeis. More recently, the Court stated:

> The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices [Brandeis] characterized as "the most comprehensive of rights and the right most valued by civilized men." The right to avoid unwelcome speech has special force in the privacy of the home and its immediate surroundings...

Hill v. Colorado, 530 U.S. 703, 716-717 (2000) (citation omitted).

The Court in *Hill* balanced this right to be let alone with the First Amendment rights of others, stating that, "The right to free speech ... may not be curtailed simply because the speaker's message may be offensive to his audience. But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Hill*, 530 U.S. at 716, citing *Frisby v. Schultz*, 487 U.S. 474, 487 (1988). Thus, the intrusive nature of some speech is to be considered. The *Hill* Court further said:

> It may not be the content of the speech, as much as the deliberate "verbal or visual assault," that justifies proscription. Even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to

> government policy in vulgar language is because offended viewers can "effectively avoid further bombardment of their sensibilities simply by averting their eyes."
>
> The recognizable privacy interest in avoiding unwanted communication varies widely in different settings. *It is far less important when "strolling through Central Park" than when "in the confines of one's own home," or when persons are "powerless to avoid" it.*

Id. (emphasis added; internal citations omitted).

B. The Protection of Children from Indecent Material.

As the second reason for the holding in *Pacifica,* the Court held that "broadcasting is uniquely accessible to children, even those too young to read," *Pacifica,* 438 U.S. at 748, and expounded as follows:

> Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held [in *Ginsberg*] that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

Id., at 749-750 (internal citations omitted).

The Court thus held that since radio and television broadcasts were uniquely available to children merely by turning on the television, they could be regulated to a greater extent than other forms of media. This is still true today. The choices parents make to limit indecency, such as keeping

television out of the home or accepting broadcast television only should be respected.[3]

Moreover, there are sound scientific reasons for protecting children from indecent broadcasts. According to the Center on Media and Child Health at Children's Hospital at Harvard, media's influence on children is "integral to their growing sense of themselves, of the world, and of how they should interact with it." [4] The Center notes that the influence of media has been linked to negative health outcomes, such as smoking, obesity, risky sexual behaviors, eating disorders, poor body image, anxiety, and violence. The Center concludes that "content matters—all media are educational." *Id.*

> The problem is that the sexualized childhood is harming young children at the time when the foundations for later sexual behavior and relationships are being laid. . . .They are forced to deal with sexual issues when they are too young, when the way they think leaves them vulnerable to soaking up the messages that surround them with few resources to resist.

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[3] The Court has long recognized a Constitutional right to bear and raise children in accordance with one's beliefs. *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, (1925), *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

[4] Center on Media and Child Health at Children's Hospital, Harvard Medical School, and Harvard School of Public Health, available at: www.cmch.tv/mentors_parents/messaging.asp (last accessed Sept. 5, 2009).

Levin, Diane E, Ph.D. and Jean Kilbourne, Ed.D. *So Sexy So Soon: The New Sexualized Childhood and what Parents Can Do to Protect Their Kids*, 63-64 (Ballantine Books, N.Y. 2008).

Eileen Zurbriggen, the chair of the American Psychological Association's Task Force on the Sexualization of Girls, reports, "The consequences of the sexualization of girls in media today are very real and are likely to be a negative influence on girls' healthy development. We have ample evidence to conclude that sexualization has negative effects in a variety of domains, including cognitive functioning, physical and mental health, and healthy sexual development."[5]

In addition to scientific studies, the Supreme Court has recently pointed out that common sense alone establishes that indecency is harmful to children:

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. . . . Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. . . . Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If

[5] Zurbriggen, Eileen, Report of the APA Task Force on the Sexualization of Girls (Washington, D.C, 2007).

enforcement had to be supported by empirical data, the ban would effectively be a nullity.

FCC v. Fox Television Stations, Inc., 556 U.S. __,129 S.Ct. 1800, 1813 (2009).

III. THE FCC'S ACTION PROPERLY REGARDED THE REGULATION OF INDECENCY ON THE AIRWAVES AS ANALOGOUS TO REGULATION OF INDECENT EXPOSURE AND PUBLIC NUISANCE.

The FCC's mandate to regulate indecency on the airwaves pursuant to 18 U.S.C. § 1464 is akin to the role government has traditionally played in regulating personal behavior in public places. An individual is not free to urinate in a public park, or to perform a striptease on a playground. There is a social consensus that some activities are best performed in private. "Our society has a tradition of performing certain bodily functions in private, and of severely limiting the public exposure or discussion of such matters. Verbal or physical acts exposing these intimacies are offensive irrespective of any message that may accompany the exposure." *Pacifica*, 438 U.S. at 746, n.23.

Prior to *Pacifica*, a nuisance rationale was used to regulate indecency. "We believe that patently offensive language ... should be governed by principles which are analogous to those found in cases relating to public nuisance." *In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI*, 56 FCC 2d 94, 98 (February 21, 1975) (internal

citations omitted), citing *Williams v. District of Columbia*, 136 U.S. App. D.C. 56 (1969) (*en banc*).

In *Williams v. District of Columbia*, the District Columbia Court of Appeals upheld the constitutionality of a disorderly conduct law enacted by Congress, stating:

> That portion of Section 1107 which makes it illegal for any person "to curse, swear, or make use of any profane or indecent or obscene words" is on its face extraordinarily broad.... We therefore conclude that Section 1107 would not be invalid if the statutory prohibition against profane or obscene language in public were interpreted to require an additional element that the language be spoken in circumstances which threaten a breach of the peace. And for these purposes a breach of the peace is threatened either because the language creates a substantial risk of provoking violence or because it is, under "contemporary community standards" . . . so grossly offensive to members of the public who actually overhear it as to amount to a nuisance.

419 F.2d 638, 644-646 (D.C. Cir. 1969) (*en banc*) (footnotes omitted).

In so holding, the *Williams* court noted that the legislative history of Section 1107 was "not inconsistent with the view" that what Congress intended to prevent was "behavior which disturbed the 'public peace and order' and not simply to prescribe a code of morals for private action." *Id.* at 644, n.13.

The *Williams* court also referred to the Model Penal Code Section 250.2 (Proposed Official Draft 1962) as prohibiting "offensively coarse utterances" *Williams*, at 640, n.2. The Comments to what became Section

250.2 are found in Tentative Draft No.13 of the Code, submitted for discussion in 1961. The Comments read in part: "Coarse or indecent language is penalized under clause (b) regardless of any actual or presumed tendency to evoke disorder among the hearers, since the interest we seek to protect is freedom from present nuisance rather than freedom from anticipated violence."*Id.*

In *FCC v. Pacifica*, the Court noted that the FCC's decision "rested entirely on a nuisance rationale under which context is all important." 438 U.S. at 750. It earlier explained the importance of this rationale in its footnote 25:

> The importance of context is illustrated by the *Cohen* case. That case arose when Paul Cohen entered a Los Angeles courthouse wearing a jacket emblazoned with the words "[F-k] the Draft." After entering the courthouse, he took the jacket off and folded it., at 1785. So far as the evidence showed, no one in the courthouse was offended by the jacket.... In contrast, in this case [*FCC v. Pacifica*] the Commission was responding to a listener's strenuous complaint...

Id. at 747, n.25.

Though the *Pacifica* Court analyzed the context of indecent words communicated between the hours of 6:00 a.m. and 10:00 p.m. on broadcast stations, concluding that the context of these indecent broadcasts rendered them a public nuisance, 438 U.S. at 750, it was careful to observe that

> Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away. *Erznoznik v. Jacksonville*, 422 U.S. 205,.... As we noted in [*Cohen*]: "While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue...."

438 U.S. at 749, n.27. The *Pacifica* Court's "pig in the parlor" analogy is as apt today as it was in the day of *Pacifica.* "[A] nuisance may be merely a right thing in the wrong place—like a pig in the parlor, instead of the barnyard.... We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Pacifica,* 438 U.S. at 750-751 (internal citation omitted).

The public airwaves have been regarded by Congress and by the courts as a place where children can watch television or listen to radio without being exposed to indecent language or indecent behavior. There is often little difference between the public airwaves and a public park. A person engaging in indecent behavior in a public park would be charged with a crime, even if they claimed to be exercising their First Amendment right to free speech. Similarly, a person engaging in indecent behavior on broadcast television should be held accountable for his actions. As Justice Souter wrote in another context, "The right to express unpopular views does

not necessarily immunize a speaker from liability for resorting to otherwise impermissible behavior meant to shock members of the speaker's audience . . . or to guarantee their attention." *Hill*, 530 U.S. at 735-736.

Thus, although the Petitioners may argue that broadcast media should not be singled out for lower scrutiny, and that technological advances render this lower standard of protection outmoded, their arguments are incorrect. The government's interest in protecting children, the fundamental right to be left alone, and the interest in prevention of public nuisances provide more than sufficient reason to reduce the level of protection to broadcast media.

IV. SEXUALLY-ORIENTED ARTISTIC EXPRESSION CAN AND SHOULD BE REGULATED IN SPECIFIC CIRCUMSTANCES BASED ON ITS HARMFUL IMPACTS ON CHILDREN AND SOCIETY.

The artistic nature of an object or performance has not been regarded as necessarily dispositive by courts when considering whether First Amendment protection is warranted, but rather courts have focused on either the subject matter or the medium of expression. For example, in *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), the Supreme Court held that, rather than providing blanket protection for artistic performances, "each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Id.* at 557. Similarly, in *Barnes v. Glen Theatre, Inc.*, 501 U.S.

560 (1991), the Court upheld restrictions on nude dancing, finding it only marginally protected as a form of expressive conduct. Since the medium plays an important part in determining whether expressive conduct is given First Amendment protection, it should be noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748.

V. THE FCC ACTION DOES NOT RESTRICT ADULTS TO VIEWING CONTENT ACCEPTABLE ONLY FOR CHILDREN.

Prohibiting indecency on the public airwaves does not reduce adults to viewing only what is fit for children. This is truer now than when *Pacifica* was decided. The public can now purchase hundreds of cable and satellite channels, some such as HBO and Showtime, specialize in producing dramas that involve mature content. Restricting indecency on the public airwaves will not drive mature programming off the air.

Furthermore, prohibiting indecency on the public airwaves will not prevent discussion of sexual issues. As Justice Stevens noted in *Pacifica*, 438 U.S. at 743, n.18, "A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."

Finally, the FCC's regulation of indecency will not deprive American adults of programming with serious artistic, literary, scientific or political value, since these factors are part of the context the FCC considers when determining whether language or images are indecent.

Regulating indecency on the public airwaves merely carves out a small zone of safety, among an ever growing sea of indecency.

CONCLUSION

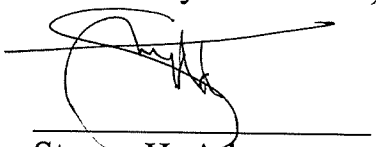
The Founders considered public morality indispensable to the maintenance of a free society. As President John Adams stated: "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." JOHN ADAMS, THE WORK OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 229 (Charles Frances Adams, ed., Boston, Mass.: Little, Brown and Company, 1854), Vol. IX, cited in DAVID BARTON, ORIGINAL INTENT 319, (Aledo, Tex.: Wallbuilders Press 2000).

In a similar vein, Benjamin Franklin said, "[o]nly a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters." BENJAMIN FRANKLIN, THE WORKS OF BENJAMIN

FRANKLIN 297 (Jared Sparks, ed., Boston, Mass.: Tappan, Whittimore and Mason 1840), Vol. X, cited in BARTON, ORIGINAL INTENT, *supra*, at 321.

The wisdom of our Founders and the cultural decline of the last fifty years suggest that the societal interest in decency and virtue is worthy of legal protection. To the extent the challenged FCC decision is an effort to support and enforce decency standards, the public interest demands that it be sustained.

Respectfully submitted this 27th day of October, 2009.



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Steven H. Aden

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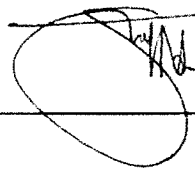
(Your Signature) 

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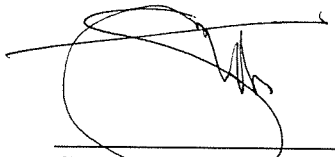

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